

FILED

MAR - 3 2008

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTYJIMMIE STEPHEN #C50483
PetitionerDECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERISHernandez et al
Respondent(s)I, JIMMIE STEPHEN, declare that I am the petitioner in the above entitled case;

08CV0357 LAB (BLM)

that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? ☐ Yes ☒ No

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer. _____

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. _____

2. Have you received, within the past twelve months, any money from any of the following sources?

- a. Business, profession or form of self-employment? ☐ Yes ☒ No
- b. Rent payments, interest or dividends? ☐ Yes ☒ No
- c. Pensions, annuities or life insurance payments? ☐ Yes ☒ No
- d. Gifts or inheritances? ☐ Yes ☒ No
- e. Any other sources? ☐ Yes ☒ No

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: _____

3. Do you own any cash, or do you have money in a checking or savings account? (Include any funds in prison accounts)

☐ Yes ☒ No

If the answer is yes, state the total value of the items owned: _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (*Excluding ordinary household furnishings and clothing*) ☐ Yes ☒ No

If the answer is yes, describe the property and state its approximate value: _____

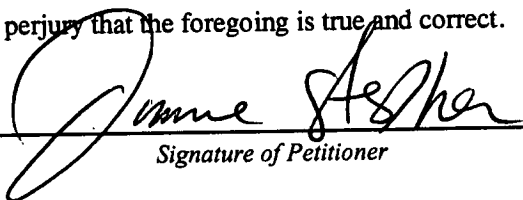
5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: NONE

I, declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

Executed on

2-21-08

Date



Signature of Petitioner

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of \$ 0 on account to his credit at the California Men's Colony institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: 0

2-28-2008

Date

Karen Mock

Acct. Tech.

Authorized Officer of Institution/Title of Officer

CALIFORNIA DEPARTMENT OF CORRECTIONS

CALIFORNIA MENS COLONY

INMATE TRUST ACCOUNTING SYSTEM

INMATE TRUST ACCOUNT STATEMENT

FOR THE PERIOD: AUG. 28, 2008 THRU FEB. 28, 2008

ACCOUNT NUMBER : C56483

BED/CELL NUMBER: EFAQB1F100001149X

ACCOUNT NAME : STEPHEN, JINNIE EARL

ACCOUNT TYPE: I

PRIVILEGE GROUP: B

TRUST ACCOUNT ACTIVITY

<< NO ACCOUNT ACTIVITY FOR THIS PERIOD >>

CURRENT HOLDS IN EFFECT

DATE PLACED	HOLD CODE	DESCRIPTION	COMMENT	HOLD AMOUNT
04/17/2007	H106	UNITED PARCEL SERVICE HOLD	4498/501	3.07

TRUST ACCOUNT SUMMARY

BEGINNING BALANCE	TOTAL DEPOSITS	TOTAL WITHDRAWALS	CURRENT BALANCE	HOLDS BALANCE	TRANSACTIONS TO BE POSTED
0.00	0.00	0.00	0.00	3.07	0.00

THE WITHIN INSTRUMENT IS A CORRECT
COPY OF THE TRUST ACCOUNT MAINTAINED
BY THIS OFFICE.

ATTEST: 02-28-2008

CALIFORNIA DEPARTMENT OF CORRECTIONS

BY Karen Mock acct-Tech.
TRUST OFFICECURRENT
AVAILABLE
BALANCE

3.07-

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 JIMMIE STEPHEN,

12 Petitioner,

13 v.

14 HERNANDEZ, et al., Warden

15 Respondent.

Civil No. 08-0357 LAB (BLM)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
17 Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to
18 move to proceed in forma pauperis.

19 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

20 Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or
21 qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See
22 Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit,
23 **no later than April 15, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of
24 his inability to pay the fee.

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1 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

2 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
3 has failed to allege that his state court conviction or sentence violates the Constitution of the
4 United States.

5 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
6 federal habeas corpus claims:

7 The Supreme Court, a Justice thereof, a circuit judge, or a district
8 court shall entertain an application for a writ of habeas corpus in
9 behalf of a person in custody pursuant to the judgment of a State
10 court only on the ground that he is in custody in violation of the
11 Constitution or laws or treaties of the United States.

12 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.
13 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800
14 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
15 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
16 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
17 United States.” *See* 28 U.S.C. § 2254(a).

18 Here, Petitioner claims that the Court erred in dismissing several of his civil rights
19 complaints, filed under 42 U.S.C. § 1983; and counting the dismissals as strikes under 28 U.S.C.
20 § 1915(g). (*See* Pet. at 6, 7, 9, 11.) In no way does Petitioner claim he is “in custody in violation
21 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254. Moreover,
22 Petitioner’s claims are not cognizable on habeas because they do not challenge the constitutional
23 validity or duration of Petitioner’s confinement. *See* 28 U.S.C. § 2254(a); *Preiser v. Rodriguez*,
24 411 U.S. 475, 500 (1973); *Heck v. Humphrey*, 512 U.S. 477, 480-85 (1994). “Section 2254
applies only to collateral attacks on state court judgments.” *McGuire v. Blubaum*, 376 F. Supp.
284, 285 (D. Ariz. 1974).

25 **FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES**

26 Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal
27 habeas claim and then refile the amended petition in this case. He must exhaust state judicial
28 remedies before bringing his claims via federal habeas. State prisoners who wish to challenge

1 their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
 2 *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a
 3 California state prisoner must present the California Supreme Court with a fair opportunity to
 4 rule on the merits of every issue raised in his or her federal habeas petition. *See* 28 U.S.C.
 5 § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court
 6 judicial remedies a petitioner must allege, in state court, how one or more of his or her federal
 7 rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995)
 8 reasoned: "If state courts are to be given the opportunity to correct alleged violations of
 9 prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting
 10 claims under the United States Constitution." *Id.* at 365-66 (emphasis added). For example,
 11 "[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him
 12 the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in
 13 federal court, but in state court." *Id.* (emphasis added).

14 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective
 15 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of
 16 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant
 17 to the judgment of a State court. The limitation period shall run from the latest of:

18 (A) the date on which the judgment became final by the
 19 conclusion of direct review or the expiration of the time for seeking
 such review;

20 (B) the date on which the impediment to filing an application
 21 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

22 (C) the date on which the constitutional right asserted was
 23 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 24 applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or
 26 claims presented could have been discovered through the exercise
 of due diligence.

27 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

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1 The Court also notes that the statute of limitations does not run while a properly filed state
 2 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003,
 3 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz v. Bennett*, 531 U.S. 4,
 4 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
 5 the appropriate court officer for placement into the record] are in compliance with the applicable
 6 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
 7 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167,
 8 181-82 (2001).

9 FAILURE TO NAME A PROPER RESPONDENT

10 Finally, review of the Petition reveals that Petitioner has failed to name a proper
 11 respondent. On federal habeas, a state prisoner must name the state officer having custody of
 12 him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule
 13 2(a), 28 U.S.C. foll. § 2254). “The ‘state officer having custody’ may be ‘either the warden of
 14 the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state
 15 penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note).

16 Here, Petitioner incorrectly named “Hernandez,” “IRS,” “Rhodes,” “Lacy,” “Shear,” and
 17 “The Attorney General of the State of California” as Respondents. None of these parties has
 18 custody over Petitioner, who is confined at California Men’s Colony. In order for this Court to
 19 entertain the Petition filed in this action, Petitioner must name the warden *currently* in charge
 20 of the state correctional facility in which Petitioner is presently confined or the Director of the
 21 California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
 22 1992) (per curiam).

23 CONCLUSION


24 Based on the foregoing, the Petition is **DISMISSED** without prejudice for failure to
 25 satisfy the filing fee requirement, failure to state a cognizable federal habeas corpus claim,
 26 failure to allege exhaustion of state judicial remedies and failure to name a proper respondent.
 27 In order to have this case reopened, Petitioner must, **no later than April 15, 2008**, (1) either

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1 pay the filing fee or provide adequate proof of his inability to pay and (2) file a First Amended
2 Petition which cures the deficiencies discussed above. *For Petitioner's convenience, the Clerk*
3 *of Court shall attach to this Order a blank application to proceed in forma pauperis and a blank*
4 *First Amended Petition form.*

5 **IT IS SO ORDERED.**

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7 DATED: February 29, 2008

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9 HONORABLE LARRY ALAN BURNS
10 United States District Judge
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